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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 747

ATHOL HORNE,

Petitioner,

v.

CLIFFORD S. WOOLEVER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

THOMAS F. BUTLER,
MARSHALL, MELHORN, BLOCH & BELT,
WILBUR C. JACOBS, *of Counsel,*
1434 National Bank Building,
Toledo 4, Ohio,
Attorneys for Petitioner.

MILTON BOESEL,
RITTER, BOESEL & HOLDEN,
604 United Savings Bldg.,
Toledo 4, Ohio,
Attorneys for Respondent.

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PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Athol Horne prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered on December 16, 1959, affirming the judgment of the Court of Common Pleas and Court of Appeals of Lucas County, Ohio, dismissing plaintiff's petition on the pleadings.

OPINION BELOW.

The opinion of the Ohio Supreme Court is reported as *Horne v. Woolever*, 170 O. S. 178; 163 N. E. (2d) 378 (appendix p. 7).

STATEMENT OF THE CASE.

Petitioner filed this action in the Common Pleas Court of Lucas County to recover damages from respondent because of respondent's negligence in a head-on automobile collision between automobiles operated by petitioner and respondent.

Respondent filed an answer alleging that petitioner's action was barred by reason of a prior suit between the

parties in which respondent had sued petitioner for damages resulting from the same accident. Respondent alleged that he had filed suit against petitioner in the Common Pleas Court of Lucas County; that petitioner removed said suit to the federal court by reason of diversity of citizenship; that petitioner filed an answer in said suit which in effect was a general denial and did not contain any counterclaim against respondent; and that said suit was dismissed with prejudice upon payment of $25,000 by petitioner to respondent, which action was taken subsequent to the filing of the present suit.

Respondent specifically pleaded the provisions of Rule 13(a), and alleged that under Rule 13(a) petitioner was obliged to file a counterclaim in the prior suit rather than a separate suit, and because of his failure to file a counterclaim in the prior suit that petitioner was barred from asserting the claim in the present suit.

Petitioner demurred to this portion of the answer. The Common Pleas Court overruled the demurrer and entered judgment dismissing the petition, and this judgment was affirmed by the Court of Appeals and the Supreme Court of Ohio.

JURISDICTION.

Jurisdiction is conferred upon this Court to hear this case by 28 U. S. C. Section 1257(3), since the Ohio Courts interpreted Rule 13(a) of the Federal Rules of Civil Procedure as preventing recovery by plaintiff in this action. This Court has on many occasions reviewed cases decided by the highest state court which have considered the effect of a judgment in a federal court proceeding as a bar in a subsequent proceeding in a state court. *Dupasseur v. Rochereau*, 21 Wall. 130; *Deposit Bank v. Frankfort*, 191 U. S. 499; *Virginia Carolina Chemical Co. v. Kirven*, 215

U. S. 252; *Stoll v. Gottlieb*, 305 U. S. 165; *Titus v. Wallick*, 306 U. S. 282; *Toucey v. N. Y. Life Insurance Co.*, 314 U. S. 118.

QUESTION FOR REVIEW.

The question presented in this petition for certiorari is whether Rule 13(a) of the Federal Rules of Civil Procedure requires a defendant in a diversity case to assert any counterclaims he may have arising out of the same transaction, although the defendant in a proceeding in the State Court is not required to assert a counterclaim but may proceed by a separate action.

STATUTES INVOLVED.

Rule 13(a) reads as follows:

> "'(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.'"

REASONS FOR GRANTING THE WRIT.

This case presents an important aspect of the rule announced in *Erie Railroad v. Tompkins*, 304 U. S. 67, that a federal court sitting in a diversity case should apply the same substantive law as a state court.

It is well settled that where the provisions of the Federal Rules of Civil Procedure conflict with the substantive law of the state, a federal court in a diversity case should

follow the law of the state rather than the Federal Rules. *Guaranty Trust Co. v. York*, 326 U. S. 99; *Cities Service Co. v. Dunlap*, 308 U. S. 208; *Klaxton Co. v. Stentor Co.*, 313 U. S. 487; *Palmer v. Hoffman*, 318 U. S. 109 and see *Moore's Federal Practice*, Vol. 1, p. 3, 501 *et seq.*

The Ohio courts believed that they were obligated by Rule 13(a) to modify Ohio's substantive law of res judicata, even though it is clear that under Ohio law a counterclaim is permissive, not compulsory. See Section 2309.35 of the Revised Code of Ohio, cited in footnote 4 of the opinion of the court below. In *Hayhurst v. Embrey* (Ohio App.) 65 N. E. 2d 660 an Ohio court sustained a demurrer to an answer identical to the one in our case. The Ohio court felt compelled by the rule to change its substantive law to accord with those states which have copied the Federal rule into their state law. (See cases listed in footnote 6 of Ohio Supreme Court opinion.)

The question of the effect which a state court is required to give to Rule 13(a) in determining whether an action is barred by reason of a prior suit in which no counterclaim was filed is an important question and apparently has not been considered by any previous decision, state or federal. This question is a matter of substantial importance in the approximately forty states such as Ohio which follow the permissive counterclaim rule. The matter should be considered and decided by this Court.

Petitioner submits that the decision of the court below was based upon an erroneous interpretation of Rule 13(a), and should be reversed, since under the ruling below the effect of a prior federal court judgment in a diversity case has a quite different substantive effect from a similar judgment of a state court. Such an interpretation is contrary to the established policy reflected in *Erie Railroad v. Tompkins* and the many succeeding cases.

No federal question would be raised if Ohio changed its decisional law so as to make all counterclaims compulsory, as contemplated by Rule 13(a). The decision below based its decision solely upon an erroneous interpretation of Rule 13(a), since it did not purport to change the rule with respect to a prior judgment in a state court.

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. BUTLER AND
WILBUR C. JACOBS, *of Counsel*,
MARSHALL, MELHORN, BLOCH & BELT,
Attorneys for Petitioner.